DOCUMENT RESUME

ED 203 367 CS 206 434

AUTHOR Overbeck, Wayne
TITLE Reporter's Privilege in the 1980s: Statutory Limits and Judicial Expansion.
PUB DATE Aug 81
NOTE 32p.: Paper presented at the Annual Meeting of the Association for Education in Journalism (64th, East Lansing, MI, August 8-11, 1981).

EDRS PRICE MF01/PC02 Plus Postage.
DESCRIPTORS *Confidentiality: *Court Litigation: *Disclosure: Higher Education: *Information Sources: Journalism: *News Reporting: State Courts: State Legislation
IDENTIFIERS *News Reporters: *Shield Legislation: Supreme Court

ABSTRACT

A summary of two countervailing trends in court decisions indicates that journalist's privilege is in a state of change and uncertainty in the early 1980s. Although 26 states have statutory shield laws enabling reporters to conceal their confidential news sources, even in these states reporters are sometimes called upon to reveal confidential information. On the other hand, in some states without shield laws, the courts have judicially recognized a limited privilege for reporters. The courts in a few states have flatly refused to take even that step. On the federal level, a number of courts have recognized a qualified privilege as a matter of federal common law if not Constitutional law in the years since the United States Supreme Court's "Branzburg" decision in 1972. Although a comprehensive federal shield law would seem the best way to protect journalists' sources, the Congress has consistently declined to enact such a law. In the meantime, the growing judicial trend is to recognize at least a limited privilege for reporters. While better than no privilege at all, this leaves much to be desired. (FL)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED203367

U.S. DEPARTMENT OF EDUCATION
NATIONAL INSTITUTE OF EDUCATION
EDUCATIONAL RESOURCES INFORMATION
CENTER (ERIC)

X This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official NIE position or policy.

Law Division

REPORTER'S PRIVILEGE IN THE 1980s:
Statutory Limits and Judicial Expansion

By Wayne Overbeck
California State University, Fullerton
Member of the California Bar

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

Wayne Overbeck

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

Presented to the Law Division
Association for Education in Journalism
Meeting at Michigan State University
August, 1981

CS206434

TABLE OF CONTENTS

Abstract	iii
Introduction	1
Is the First Amendment a Shield?	2
From Branzburg to Baker	6
Constitutional and Common Law Development	7
State Court Decisions	15
State Shield Laws	18
Summary	26
References	28

INTRODUCTION

A decade ago, whether a journalist could be required to reveal his confidential sources was almost always a question of statutory law. If a state had a strong shield law, journalists there could probably keep their sources secret; if not, they had to reveal their sources or risk a contempt of court citation. At that point, neither the traditional common law nor the federal Constitution provided a "newsgatherer's privilege" comparable to the long-established evidentiary privileges of attorneys, physicians, clergymen, and spouses. However, a number of states had created such a privilege by statute, and the courts generally accepted this statutory limitation on their powers.

In recent years, however, two dramatic but countervailing trends have narrowed the gap between jurisdictions with and without statutory shield laws. On the one hand, state courts have repeatedly carved out judicial exceptions to seemingly absolute shield laws, requiring journalists to reveal their sources or go to jail despite the existence of such a law. On the other, state and federal courts all over the country have been judicially recognizing a reporter's privilege where none exists by statute. By the end of 1980, no fewer than six state Supreme Courts had recognized the privilege in states lacking statutory shield laws. Similarly, numerous federal appellate courts have now recognized a journalist's privilege either inherent in the Constitution or the federal rules of court procedure. Branzburg v. Hayes[1]--the only U.S. Supreme Court

ruling on this issue to date--was initially seen as a major defeat for reporter's privilege, but many lower federal and state courts have nevertheless recognized the privilege in the years since, often citing the dissenting and concurring opinions in Branzburg as authority.

IS THE FIRST AMENDMENT A SHIELD?

An appellate court first ruled on the argument that the First Amendment constitutes a shield law in a 1958 libel decision, Garland v. Torre[2]. Columnist Marie Torre made some unflattering statements about actress Judy Garland and attributed them to an unnamed CBS network executive. Garland sued for libel and demanded the identity of the source during the discovery process. Torre refused to comply and a federal trial court cited her for contempt. She appealed, and the U.S. Court of Appeals upheld the citation and Torre was sentenced to 10 days in jail.

In an opinion by Potter Stewart (later a Supreme Court justice) the appellate court conceded that this case required a difficult balancing of two rights, but the information sought went to the heart of Garland's claim, Stewart said. Thus, the reporter's right to keep a source confidential had to give way to the right of a court to require the disclosure of relevant information.

After that defeat, the idea of a Constitutional reporter's privilege remained in limbo until the late 1960s. At that point the argument began to be seriously reconsidered in view of the flood of contempt citations journalists faced in those years. In 1970 and 1971, three appellate court rulings on the issue were

appealed to the Supreme Court. In one of these cases a court recognized a Constitutional privilege while the other two denied its existence. To resolve this conflict, the Supreme Court agreed to hear the three cases together.

The result was Branzburg v. Hayes, an important 1972 decision that denied the existence of a Constitutional reporter's privilege in cases such as the ones before the court. However, the result was confusing because the vote was 5-4, with only four justices rejecting a Constitutional shield outright while four dissenters said there should be a qualified Constitutional shield. The swing vote was provided by Justice Lewis Powell, who said the First Amendment should not excuse journalists from revealing their sources in these cases. However, Powell also suggested that it might under some other circumstances.

The three cases that were consolidated in Branzburg involved widely varying circumstances, but all had one thing in common: reporters had refused to answer grand juries' questions about potential criminal activity they allegedly witnessed. The case where a court recognized a Constitutional reporter's shield, U.S. v. Caldwell[3], involved Earl Caldwell, a Black reporter for the New York Times. Caldwell had interviewed leaders of the militant Black Panther movement. In California, a federal grand jury investigating Black groups ordered Caldwell to testify and to bring along his notes and tapes.

Caldwell refused to even appear. Not only would testifying breach his confidential relationships with his news sources, but merely appearing would have the same effect, because grand jury

proceedings are secret. If Caldwell appeared, the Panthers might never know for sure whether he kept his promises of confidentiality.

Caldwell and the Times asked a federal district court to quash the grand jury subpoena. The court only granted the request in part, and Caldwell appealed. The ninth circuit U.S. Court of Appeals ordered the subpoena quashed, ruling that Caldwell had a First Amendment right to keep his sources confidential. The U.S. government appealed to the Supreme Court.

In the second case of the Branzburg trilogy, In re Pappas[4], television journalist Paul Pappas was invited to a Black Panther headquarters in Massachusetts. He also promised not to disclose any information he was given in confidence. A county grand jury summoned him and asked what he had seen at Panther headquarters. He refused to answer many of the grand jury's questions, citing the First Amendment (Massachusetts had no statutory journalist's privilege). The state Supreme Court rejected his argument and he appealed to the U.S. Supreme Court.

In the Branzburg case itself[5], Louisville Courier-Journal reporter Paul Branzburg observed two young men processing hashish, and wrote a bylined story about it. The article included a tightly cropped photo of a pair of hands working with what the caption said was hashish. Later, Branzburg wrote an article about drug use in Frankfort, Kentucky. The article said he spent two weeks interviewing drug users. Branzburg was twice subpoenaed by grand juries, but he refused to testify, citing both a Kentucky reporter's privilege statute and the First Amendment. He appealed both subpoenas, but the Kentucky Court of

Appeals ruled against him, declaring that neither the First Amendment nor the Kentucky shield law applied to his situation. The shield law, the court said, only applied to the identities of informants; it did not excuse a reporter from testifying about events he personally witnessed. Branzburg appealed to the U.S. Supreme Court.

Consolidating the three cases, the Supreme Court said all three reporters had to comply with the grand jury subpoenas. Thus, the high court affirmed the lower court rulings in Branzburg and in In re Pappas while reversing the Caldwell decision. Four Supreme Court justices said that a journalist has the same duty as any other citizen to testify when called upon to do so. However, Justice Powell, who provided the crucial fifth vote to reject a reporter's privilege in these cases, didn't go that far. He left open the possibility that the First Amendment might excuse a reporter from revealing confidential information under other circumstances. Powell said:

> "The asserted claim to privilege should be judged on its facts by striking of a proper balance between freedom of the press and the obligation of all citizens to give relevant testimony with respect to criminal conduct. The balance of these vital Constitutional and societal interests on a case-by-case basis accords with the tried and traditional way of adjudicting such questions.
> "In short, the courts will be available to newsmen under circumstances where legitimate First Amendment interests require protection."[5]

Thus, Powell felt a balancing process was necessary, with a Constitutional shield for journalists available in some cases. One dissenter (Justice Douglas) took the absolute position that no restriction on freedom of the press, including the requirement that reporters testify in a court, was constitutional. The other

three dissenting justices (Stewart, Brennan and Marshall) said they thought there should be a qualified journalist's privilege, based on the Constitution. These three justices said that, to justify requiring a journalist to reveal his sources, the government should have to show:

> 1) that there is probable cause to believe the journalist has clearly relevant information regarding a specific probable violation of law;
>
> 2) that the information cannot be obtained in some way that doesn't so heavily infringe on the First Amendment;
>
> 3) that there is a compelling and overriding interest in the information.[7]

Even though these guidelines appeared in a dissenting opinion, they have been used by several lower federal and state courts in deciding journalist's privilege cases in recent years. The Branzburg decision, it turns out, was not quite the defeat for the media that it first appeared to be. The high court refused to create a Constitutional shield law, but five of the nine justices (the four dissenters plus Powell) did say the Constitution gives journalists at least a limited right to withhold confidential information. Since then, a number of lower federal and state courts have undertaken the balancing process suggested by Powell, often ruling that journalists' confidential information is privileged in situations different from the ones that led to the Branzburg ruling (grand jury investigations). In so ruling, courts have often looked to the guidelines in the Branzburg dissent.

Perhaps foreshadowing things to come, it was only a few months after Branzburg that a federal appellate court first refused to follow it. Late in 1972, the second circuit U.S. Court of Appeals distinguished Branzburg and held that a journalist had a Constitutional right to withhold his sources under other circumstances than those in Branzburg (Baker v. F & F Investment)[8]. The author of an article exposing the "blockbusting" practices of realtors in all-White neighborhoods was asked to reveal his source--in a lawsuit between black homebuyers and real estate firms. Since the source was in real estate, he would be subjected to harassment and economic harm if identified, the writer said. The appellate court allowed the writer to keep the source confidential, noting that Branzburg involved grand jury investigations, not a civil lawsuit to which the journalist was not a party. In this instance, at least, the second circuit U.S. Court of Appeals said the First Amendment protected the author's right to keep his source confidential.

CONSTITUTIONAL AND COMMON LAW DEVELOPMENT

In addition to the Constitutional argument for a reporter's privilege, in the years since Branzburg some federal courts have recognized a limited federal common law journalist's privilege as inherent in the Federal Rules of Criminal Procedure, the Federal Rules of Civil Procedure and the Federal Rules of Evidence. None of these rules specifically mentions a reporter's privilege, but several federal courts have held that a qualified reporter's privilege is inherent in them. For instance, Rule 17(c) of the Federal Rules of Criminal Procedure authorizes courts to quash

subpoenas that are "unreasonable or oppressive." Rule 501 of the Federal Rules of Evidence recognizes the concept of evidentiary privileges. It doesn't mention a reporter's privilege, but the Congressman most responsible for drafting Rule 501 said in Congress: "The language of Rule 501 permits the courts to develop a privilege for newspaper people on a case-by-case basis."[9]

By 1981, courts in half of the federal circuits had recognized a limited reporter's privilege under various rationales, including the First Amendment, the federal rules of procedure, federal common law, or a combination of these. However, none of the federal courts had recognized the sort of absolute privilege journalists seek. Instead, the courts have weighed reporters' privilege claims against other considerations, often ruling that the privilege must give way--or at least that the media must let a judge examine the purportedly confidential information to determine if it should be disclosed. In such cases, difficult confrontations between the press and the judiciary often result.

For instance, in late 1980 the third circuit U.S. Court of Appeals ruled against the producers of the CBS television program, "Sixty Minutes," on a reporter's privilege issue. In U.S. v. Cuthbertson[10], a federal judge in New Jersey ordered CBS to submit confidential materials to him for an in-chambers review. The judge hoped to determine whether the materials should be released to the defendants in a criminal case that stemmed from a "Sixty Minutes" story.

The Cuthbertson case resulted from a story entitled "From Burgers to Bankruptcy." It questioned the franchising practices of an East Coast fast food chain, Wild Bill's Family Restaurants. A grand jury later indicted several Wild Bill's executives on various criminal charges. The executives subpoenaed CBS' outtakes and other unpublished information before their trial. The judge ordered CBS to provide much of the requested material for an in-chambers inspection. When CBS refused, the judge cited the network for contempt, and CBS appealed. The federal Court of Appeals affirmed the judge's order. The judge would have to see the materials to adequately weigh the defendants' need for them against the network's qualified privilege to keep them confidential, the appellate court ruled. Thus, the appellate court affirmed the contempt citation against CBS. Finally, CBS petitioned the Supreme Court for a hearing but was turned down. CBS eventually turned over the subpoenaed material.

Cuthbertson notwithstanding, the federal third circuit is among the leaders in recognizing a reporter's privilege judicially. That circuit has ruled that the privilege covers not only sources but also unpublished materials, and that it applies in both criminal and civil cases.

For instance, a year before Cuthbertson the third circuit affirmed a reporter's right to keep her sources confidential in a civil case, Riley v. Chester[11]. A lawsuit was filed by a police officer who contended he was harassed by the police chief and others in the department when he ran for mayor. He wanted to know the source of a news story he considered unfavorable, but the reporter, Geraldine Oliver of the Delaware County

(Pennsylvania) Daily Times refused to disclose it at a court hearing. Oliver was cited for contempt, but the appellate court overturned the citation because the identity of the source was not relevant enough to the case to override the qualified reporter's privilege. In so ruling, the court said that three requirements had to be met before a reporter should be required to disclose confidential information: 1) the information had been sought elsewhere; 2) the information could not be obtained from other sources; and 3) the information was clearly relevant to the case.

On the other hand, the third circuit refused to uphold the reporter's privilege in another 1980 decision, U.S. v. Criden[12]. In that case, Jan Schaffer, a Philadelphia Inquirer reporter, refused to testify about her conversations with a U.S. attorney during the "Abscam" case, in which many public officials were charged with bribery. The U.S. attorney admitted the conversations had occurred, and Schaffer was eventually cited for contempt. The third circuit Court of Appeals affirmed a contempt citation, deciding that the issue here was not confidentiality (the source had already waived his right to confidentiality) but the conduct of the U.S. attorney in allegedly "leaking" word of the investigation to the press. In this criminal proceeding, the defendants were seeking a dismissal by alleging prosecutorial misconduct, and sought Schaffer's testimony to show this misconduct. The appellate court ruled that the reporter's testimony was crucial to the case and thus affirmed the civil contempt citation. In so ruling, the court noted:

"When no countervailing constitutional concerns are at stake, it can be said that the privilege is absolute; when constitutional precepts collide, the absolute gives way to the qualified and a balancing process comes into play to determine its limits."[13]

The third circuit then applied the three-part test it enunciated in Riley, and found it satisfied. Thus, the court said the reporter's privilege had to yield to the defendants' Sixth Amendment right to a fair trial in this particular case.

In early 1981, the U.S. Supreme Court refused to hear an appeal of the third circuit decision, seemingly forcing Schaffer to choose between testifying about her conversations and going to jail. However, all four of the Philadelphia "abscam" defendants either were acquitted or had the charges against them dismissed. As a result, for a time the only person facing a possible jail sentence in this portion of the "abscam" investigation was a journalist. The contempt citation against Schaffer was dropped after she agreed to reveal whether she had in fact interviewed the U.S. attorney in the case, without revealing the content of the conversation. Nevertheless, the case was closed only because the defense attorneys said they no longer needed Schaffer's testimony--not because of any victory for the reporter's privilege.

Meanwhile, other federal apppellate courts across America have also recognized a qualified reporter's privilege in the years since Branzburg. But like the Criden decision, these other decisions have emphasized the limited nature of the privilege, insisting that it must be balanced against other rights. For example, in Silkwood v. Kerr-McGee,[14] the tenth circuit Court of Appeals recognized the reporter's privilege and said it applied

to a documentary film-maker. The court overturned a trial judge's order requiring the film-maker to reveal his confidential information because the party seeking it (the Kerr-McGee Corporation) had not diligently tried to secure it elsewhere first. In any future request for the film-maker's (or any other journalist's) confidential information, the trial court was ordered to weigh: 1) the relevance and necessity of the information; 2) whether it went "to the heart of the matter"; 3) its possible availability elsewhere; and 4) the type of case involved. The Silkwood case attracted wide attention because Karen Silkwood was killed in an auto accident en route to testify to the Atomic Energy Commission about allegedly dangerous practices of her employer, the Kerr-McGee Corporation. This civil lawsuit by her estate and others charged the company with violating her civil rights.

In a civil libel case, the first circuit U.S. Court of Appeals handed down still another 1980 decision recognizing the existence of a journalist's privilege. In Bruno and Stillman v. Globe Newspaper,[15] the court ruled on a dispute over pretrial discovery of a reporter's confidential sources by emphasizing the balancing of rights necessary in such cases. The court reaffirmed the existence of the privilege, but said the trial court had to balance the First Amendment interests involved against the plaintiff's need for the information. The case was remanded, with instructions for the trial judge to follow in deciding whether to order the newspaper involved (the Boston Globe) to disclose its sources for a series of stories

criticizing the plaintiff's products (fishing boats).

The fifth federal appellate circuit also recognized the reporter's privilege in 1980, in Miller v. Transamerican Press.[16] But in that case, the Court of Appeals said the privilege had to give way to a libel plaintiff's need for confidential information without which he could not prove actual malice. Thus, the appellate court allowed the discovery of a magazine's confidential sources.

On the other hand, a federal district court in Washington, D.C., decided not to require a reporter to reveal his sources under reasoning similar to that in the Silkwood case. In a 1979 decision, U.S. v. Hubbard,[17] the court recognized a Washington Post reporter's qualified privilege, and evaluated the Church of Scientology's demand for the reporter's notes about an FBI investigation of the church. The court decided the privilege protected the reporter, since the same information could be obtained from FBI sources.

The U.S. Court of Appeals for Washington, D.C. followed up the Hubbard ruling with a 1981 decision that strongly endorsed the concept of a reporter's privilege, Zerilli v. Smith.[18] The case arose after U.S. Justice Department officials allegedly leaked wiretapped telephone conversations of Detroit underworld leaders to the Detroit News. Two reputed underworld figures sued the Justice Department and sought a court order requiring a reporter to reveal his sources.

The judge refused to issue such an order, and his decision was appealed. The appellate court affirmed the refusal, noting that the plaintiffs had not exhausted alternative means of

securing the information. They had not queried Justice Department employees who had access to the tapes, for instance. In civil cases to which the reporter is not a party, a reporter is exempt from revealing his sources "in all but the most exceptional cases," the appellate court held.

The court said that to overcome the reporter's privilege, a civil litigant must show: 1) that his lawsuit is not frivolous; 2) that the information sought is crucial to the casse; and 3) that all alternative sources for the information have been exhausted.

The ninth circuit has also recognized the reporter's privilege, starting with its ruling in Caldwell v. U.S., which was later reversed by the Supreme Court. However, in 1975 the ninth circuit again recognized the privilege in Farr v. Pitchess.[19] In that case, part of the protracted litigation involving reporter Bill Farr (discussed later because it largely involves state law), the U.S. Court of Appeals said the trial court's need for the identity of Farr's sources outweighed his privilege. As a result, the federal court refused to set aside a contempt citation, although it did acknowledge the existence of a reporter's privilege.

Thus, in a wide variety of situations, federal courts all over the United States have recognized the existence of a reporter's privilege, although they have weighed it against other interests, such as a criminal defendant's right to a fair trial or a civil libel plaintiff's need for confidential information to show actual malice.

STATE COURT DECISIONS

Meanwhile, at least six state supreme courts have also recognized a qualified journalist's privilege in the absence of a statutory shield law. For instance, in 1977 the Iowa Supreme Court recognized a qualified First Amendment privilege for reporters. In a libel case, Winegard v. Oxberger,[20] the court roughly followed the three-part test in the Branzburg dissent, indicating that a reporter could refuse to reveal confidential information, at least in a civil proceeding, unless: 1) the information sought "goes to the heart of the matter" before the court; 2) other reasonable means of obtaining the information have been exhausted; and 3) the lawsuit in which the information is sought does not appear to be "patently frivolous." However, the Iowa Supreme Court weighed the case at hand and decided that three-part test was met, so the reporter was not excused from revealing her sources for several stories about a protracted divorce case that led to a libel suit.

A number of other state courts have also found a basis for a journalist's privilege under their own state constitutions or the federal constitution. In some cases, the privilege has been ruled applicable even in criminal proceedings when a defendant contended he needed the information for his defense. For instance, in a murder case (Zelenka v. Wisconsin[21]) the Wisconsin Supreme Court so ruled, although the court emphasized that the journalist's right to withhold confidential information had to be balanced against the defendant's need for the information. The case stemmed from a drug-related murder,

and the defendant sought the identity of the source for an underground newspaper story which claimed the victim had been cooperating with narcotics officers. The state Supreme Court said the defendant had not shown that the privileged information would have helped him build a defense. Thus, the court upheld the reporter's right to keep his source confidential.

Similarly, the supreme courts of Kansas, Virginia and Vermont have recognized a qualified reporter's privilege in the absence of a state shield law (see Kansas v. Sandstrom,[22] Brown v. Virginia,[23] and Vermont v. St. Peter[24]).

On the other hand, some state supreme courts have flatly refused to recognize any journalist's privilege, even a qualified one. The Idaho Supreme Court, for instance, once refused to recognize a First Amendment privilege for journalists (Caldero v. Tribune Publishing[25]), although that court has more recently moderated its stance on the issue. The New Hampshire Supreme Court has also denied the existence of a Constitutional privilege (see, for instance, Opinion of the Justices[26]).

The Idaho Caldero case was particularly notable for the stridency of the court's language in condemning the concept of a reporter's privilege:

> "In a society so organized as ours, the public must know the truth in order to make value judgments, not the least of which regard its government and officialdom. The only reliable source of that truth is a "press"...which is free to publish that truth without government censorship. We cannot accept the premise that the public's right to know is somehow enhanced by prohibiting the disclosure of truth in the courts of the public."[27]

Caldero was a libel case in which the plaintiff, a police officer, was criticized by a newspaper for shooting a suspect

fleeing a minor crime. The officer, Michael Caldero, sought the identity of a source for the newspaper article during pre-trial discovery, but the paper refused to reveal it. The Idaho Supreme Court affirmed a contempt citation against a reporter, flatly refusing to recognize any journalist's privilege.

However, three years after Caldero, the Idaho Supreme Court backpedaled on the privilege issue in Sierra Life v. Magic Valley Newspapers,[28] another libel case in which the plaintiff demanded the identity of confidential sources during pretrial discovery proceedings. Here the Twin Falls Times-News published stories reporting on actions taken against a life insurance company by other western states. The company never alleged that anything in the stories was false, but nonetheless a trial judge ordered the paper to name its sources in pretrial discovery. The paper refused, maintaining that the information was taken from public records and was accurate, and that sources within the company merely told reporters where to look to find these public reords. When the paper refused to reveal the sources, the judge stripped the paper of all its normal libel defenses and entered judgment in the amount of $1.9 million for the plaintiff--still without any showing that the paper had published any falsehood.

The Idaho Supreme Court was forced to back away from its refusal to recognize a reporter's privilege, reversing the judge's action and reinstating the paper's defenses. The court acknowledged that at least a journalist's confidential information has to be shown to be relevant before it can be discovered, citing Herbert v. Lando.[29] The court said the

plaintiff had not shown that knowing the identity of the sources would help prove its libel case. This time, the Idaho Supreme Court was at least a little more sympathetic to the needs of the media:

> "We recognize that the news media rely upon confidential sources in the preparation of many stories.... The ability to keep the identity of those sources confidential is not infrequently a prerequisite to obtaining information. This interest, while legitimate, is not so paramount that legitimate discovery needs of a libel plaintiff must bow before it. But by the same token a trial court can be expected to exercise caution when it orders these sources be revealed. As the Supreme Court of the United States has suggested, the first question to be answered is whether the identity of the sources is relevant."[30]

Thus, the Idaho Supreme Court afforded limited protection to journalist's sources in Sierra Life. Still, Idaho journalists enjoy far less protection from indiscriminate discovery or subpoenas than do journalists in many states. In states such as Idaho, journalist need a statutory shield law far more than they do in states where the courts have given them more constitutional protection. Perhaps it would be best if there were a federal shield law applying to all state and federal proceedings, but Congress has repeatedly declined to enact one. As a result, a reporter's privilege exists only where the courts or state legislatures have recognized or created it. Fortunately, 26 states now have statutory shield laws, and favorable court decisions have created a qualified reporter's privilege in a number of others.[31]

STATE SHIELD LAWS

Among the 26 states that had enacted statutory shield laws at this writing, there was a wide variation in philosophy and

approach. Moreover, some state shield laws have been significantly altered by judicial interpretation. Ironically, while some state Supreme Courts have been judicially creating a journalist's privilege where none exists by statute, the New Mexico Supreme Court went so far as to overturn a statutory shield law as an unconstitutional encroachment on the information-seeking authority of the judiciary (see Ammerman v. Hubbard Broadcasting, Inc.[32]).

The 26 states that have enacted statutory shield laws, and the years of their enactment, are: Maryland (1896), New Jersey (1933) Alabama (1935), California (1935), Arkansas (1936), Kentucky (1936), Arizona (1937), Pennsylvania (1937), Indiana (1931), Montana (1943), Michigan (1949), Ohio (1953), Louisiana (1964), Alaska (1967), New Mexico (1967), Nevada (1967), New York (1970), Illinois (1971), Rhode Island (1971), Delaware (1973), Nebraska (1973), North Dakota (1973), Minnesota (1973), Oregon (1973), Tennessee (1973), and Oklahoma (1974). Many of these statutory laws have been extensively revised since their original enactment and, as just noted, some have been severely limited by judicial interpretation.

Some shield statutes appear very strong but have been fatally weakened by court decisions. Others have been upheld and even strengthened by court decisions. Generally, shield laws fall into three groups: 1) absolute privilege laws, which seemingly excuse a reporter from ever revealing a news source in a governmental inquiry; 2) laws that only apply the privilege if information derived from the source is actually published or

broadcast; and 3) qualified or limited privilege laws, which may have one or many exceptions, often allowing the courts to disregard them under certain circumstances.

Sadly, the reality about statutory shield laws is that many lawyers and judges don't like them. Judges sometimes find themselves dealing with reporters who possess important information--information that might well affect the outcome of a case--but who simply refuse to fulfill what judges see as a civic responsibility by disclosing it. How can a court seek the truth under those circumstances, judges ask? Some judges view shield laws as obstacles to justice, laws made by people who are, after all, politicians. Shield laws, they feel, strip the courts of some of their authority to do an important job. Many judges seem perfectly willing to weigh a journalist's privilege against other interests; some are willing to judicially create such a privilege in the absence of a statutory law, as just explained. However, when a legislature makes the decision for them--and makes the privilege absolute under all circumstances--judges tend to look for ways out.

Perhaps the sentiment of the legal establishment was best summarized many years ago by John Wigmore, the preeminent scholar on the law of evidence. Speaking in 1923 about the nation's first shield law, enacted in Maryland in 1896, he said: "the (Maryland) enactment, as detestable in substance as it is in form, will probably remain unique."[33]

Wigmore's prediction was wrong, of course, but the sentiment has been shared by generations of lawyers and judges. For years judges have been whittling away at the older common law

evidentiary privileges of doctors, lawyers and clergymen, and they have shown great ingenuity in manipulating the language of state shield laws to reduce their impact.

For sheer judicial gall, certainly the most notable court decision on a shield law is Ammerman v. Hubbard Broadcasting, the New Mexico case cited earlier. In that decision, the state supreme court said the legislature didn't have the power, under the state constitution, to restrict a judge's authority in this way. Thus, the court simply invalidated the whole shield law as it applied to the state's judiciary. The New Mexico shield law[34] is still valid in connection with legislative and administrative proceedings, but not in court proceedings (including grand jury investigations). That means the New Mexico shield law is nearly useless, since reporters are rarely required to reveal confidential information except in court proceedings. To justify its decision, the New Mexico Supreme Court declared that a shield law is a procedural rule. The legislature has no authority to dictate procedural rules to the judiciary, the court said.

No other state's highest court has gone quite that far, but several other courts have handed down decisions narrowing the scope or broadening the exceptions to various state shield laws. For instance, New York courts repeatedly carved out judicial exceptions to that state's shield law[35] in the early years after its enactment in 1970. For instance, by 1973, the courts had created a prescient witness exception and ruled that the law didn't apply unless a reporter had promised confidentiality to a source. They also ruled that the law didn't apply if the

information came to a reporter unsolicited (see, for instance, WBAI-FM v. Proskin[36]). In New York, more than a dozen reported court decisions have gone against journalists who were seeking to keep sources or information confidential under the state's shield law.

Across the continent in California, the pattern is much the same. State courts repeatedly narrowed the scope of a seemingly absolute shield law during the 1970s. First, an appellate court said the law simply didn't apply when a judge was trying to find out who violated a judicial "gag" order. The legislature doesn't have the authority to pass a law that makes it impossible for courts to investigate violations of their orders, the court held (Farr v. Superior Court[37]).

As an example of the tribulations a reporter may face in order to protect his sources, the Bill Farr case has few equals. Over a five-year period, the Farr case produced four appellate court decisions. Farr, a reporter covering the celebrated Charles Manson murder trial for the Los Angeles Herald Examiner when the case began, spent 45 days in jail and faced a possible indefinite sentence for refusing to reveal his sources.

Farr was given a statement by a prospective witness who said Manson's counter-culture "family" intended to torture and murder several more show business personalities. Farr got that information from two of the attorneys handling the case, and they were violating a protective ("gag") order by giving it to him. After Farr published a story based on this confidential information, the trial judge ordered him to reveal which two attorneys (of six handling the case) had violated the court

order. Farr refused and was eventually cited for civil contempt.

After the initial appellate court ruling that stripped Farr of the protection of the California shield law[38] (Farr v. Superior Court, cited earlier), it appeared he could face a life sentence if he steadfastly refused to reveal his sources. But in 1974, an appellate court set up a mechanism to allow the eventual release of persons who disobey court orders as a matter of principle (In re Farr[39]). Under this procedure, the trial court was to hold a hearing to determine if further incarceration would result in the court order being obeyed. If not, the civil contempt citation had to be set aside or transformed into criminal contempt, with a fixed-term sentence. Such a hearing was held for Farr, and the long-pending civil contempt citation was set aside. Nevertheless, a new criminal contempt proceeding was initiated against him the next day. He was eventually sentenced to five more days in jail and a $500 fine. That sentence was delayed while Farr again appealed, but the new contempt citation was upheld by the ninth circuit U.S. Court of Appeals (in Farr v. Pitchess, cited earlier), However, a California appellate court eventually set it aside as a multiple prosecution for the same event (In re Farr[40]).

Farr's legal troubles were still not over, however. He was named as a defendant in a $24 million libel suit by two of the attorneys, who contended their reputations were injured by his statement that two unnamed attorneys violated a court order. That libel suit was finally dismissed in 1979, but the dismissal was appealed. In early 1981, ten years after the Farr case

began, the litigation still had not been terminated.

In 1978, another California appellate court said the state's shield law didn't apply when the information might help exonerate someone charged with a crime, because the defendant's constitutional right to a fair trial was paramount. Thus, the reporter would be required to bring in the requested information for a judge's inspection in his chambers, with the judge entitled to release the information if he deemed it significant to the case (CBS v. Superior Court[41]).

In 1980 the people of California voted by a three-to-one margin to place the shield law in the state Constitution. Advocates of a strong reporter's privilege hoped this would end the judicial exception-carving, since the shield law now immediately follows the basic guarantee of a free press in Article I, Section 2 of the California constitution. However, given a conflict between a criminal defendant's right to a fair trial, guaranteed by the Sixth Amendment to the U.S. Constitution, and the reporter's shield provision in the California Constitution, a court would be free to decide the balances were tipped in favor of the defendant's federal constitutional right. It remains to be seen how the courts will interpret California's new Constitutional shield law.

In New Jersey as in New York, New Mexico and California, the courts have created a large loophole in a seemingly strong statutory shield law.[42] In the celebrated Myron Farber case, the court said the shield law must give way when a criminal defendant seeks evidence held by a journalist. At the very least, the journalist must submit the material to a judge, who is to make an

in-chambers evaluation and decide whether to release the information (In re Farber[43]).

Thus, the New Jersey Supreme Court gave judges in that state the authority to order journalists to bring in their confidential information for in-chambers review, with the information to be released if the judge decides the criminal defendant's need for the information outweighs the reporter's interest in keeping it confidential. For refusing to comply with such an order, Farber spent 40 days in jail, and his employer, the New York Times, paid fines exceeding $250,000 during a celebrated murder trial in 1978.

In a number of other states, courts have taken similar steps to narrow the scope of state shield laws. However, some state courts have not only affirmed shield laws but given them a broad interpretation. A notable example is Pennsylvania, where the state Supreme Court significantly expanded the shield law's scope in In re Taylor.[44] The Pennsylvania law[45] specifically protects only "sources of information", but the court interpreted that language to include notes and other unpublished materials, even if they didn't reveal the news source. Moreover, Pennsylvania state courts have liberally interpreted a phrase in the law that exempts reporters from revealing their sources "in any legal proceeding." "Any legal proceeding" really means what it says, the Pennsylvania courts have ruled.

Furthermore, a federal court deciding a case that arose in Pennsylvania chose to observe the state shield law in Steaks Unlimited v. Deaner.[46] That decision is neither surprising nor

unique, inasmuch as federal courts are supposed to apply most kinds of state law in "diversity of citizenship" cases (i.e. cases decided in federal rather than state courts only because they involve citizens of two different states). The Pennsylvania shield law did not apply in the federal case from Pennsylvania discussed earlier (Riley v. Chester) because it was not a diversity case. Riley was a federal civil rights case.

SUMMARY

Journalist's privilege is in a state of change and uncertainty in the early 1980s. Although 26 states have statutory shield laws, even in these states reporters are sometimes called upon to reveal confidential information. On the other hand, in some states without shield laws, the courts have judicially recognized a limited reporter's privilege, but the courts in a few states have flatly refused to take that step. On the federal level, a number of courts have recognized a qualified privilege as a matter of federal common law if not Constitutional law in the years since the Supreme Court's Branzburg decision.

It would seem that a comprehensive federal shield law would be the best way to protect journalist's sources, but Congress has consistently declined to enact such a law. In the meantime, the growing judicial trend is to recognize at least a limited reporter's privilege. While better than no privilege at all, this leaves much to be desired. Journalists must be prepared to go to jail--or spend thousands of dollars on litigation--to protect their confidential sources. At least the judiciary is now on notice that many journalists will not breach their

promises of confidentiality. Given the possibility of an ugly confrontation that may make a jailed journalist into a folk hero, many state and federal judges are choosing to recognize the reporter's privilege instead--and they have a growing body of case law to cite as precedent.

REFERENCES

1. Branzburg v. Hayes, 408 U.S. 665, 1972.
2. Garland v. Torre, 259 F.2d 545, 2nd cir. 1958.
3. U.S. v. Caldwell, 434 F.2d 1081, 9th cir. 1970.
4. In re Pappas, 266 N.E.2d 297, 1971.
5. See Branzburg v. Pound, 461 S.W.2d 345, 1970.
6. 1 Med.L.Rptr. at 2635.
7. See 1 Med.L.Rptr. at 2646-2647.
8. Baker v. F & F Investment, 470 F.2d 778, 2nd cir. 1972.
9. Statement by Congressman Hungate, explaining the final Conference Report version of the Federal Rules of Evidence, 120 Cong.Rec.H. 12253-54 (daily ed. Dec. 18, 1974).
10. U.S. v. Cuthbertson, 630 F.2d 139, 3rd cir. 1980.
11. Riley v. City of Chester, 612 F.2d 708, 3rd cir. 1979.
12. U.S. v. Criden, 6 Med. L. Rptr. 1993, 3rd cir. 1980.
13. 6 Med.L.Rptr. at 2001.
14. Silkwood v. Kerr-McGee, 563 F.2d 433, 10th cir. 1977.
15. Bruno and Stillman v. Globe Newspaper, 6 Med.L.Rptr. 2057, 1st cir. 1980.
16. Miller v. Transamerican Press, 6 Med.L.Rptr. 1599, 5th cir. 1980.
17. U.S. v. Hubbard, 5 Med.L.Rptr.1719, U.S.D.C., D.C.cir. 1979.
18. Zerilli v. Smith, 7 Med.L.Rptr. 1121, D.C.cir. 1981.
19. Farr v. Pitchess, 522 F.2d 464, 9th cir. 1975.
20. Winegard v. Oxberger, 258 N.W.2d 847, 1977.
21. Zelenka v. Wisconsin, 266 N.W.2d 279, 1978.
22. Kansas v. Sandstrom, 581 F.2d 812, 1978.
23. Brown v. Virginia, 204 S.E.2d 429, 1974.

24. Vermont v. St. Peter, 315 A.2d 254, 1974.

25. Caldero v. Tribune Publishing, 562 P.2d 791, 1977.

26. Opinion of the Justices, 2 Med.L.Rptr. 2083, N.H. 1977.

27. 2 Med.L.Rptr. at 1498-99.

28. Sierra Life v. Magic Valley Newspapers, 6 Med.L.Rptr. 1769, 1980.

29. Herbert v. Lando, 99 S.Ct. 1635, 1979.

30. 6 Med.L.Rptr. at 1773.

31. See Pickerill, Albert G., ed., The Courts and the News Media, third edition, San Francisco: California Judges Association, 1980.

32. Ammerman v. Hubbard Broadcasting, Inc., 551 P.2d 1354, 1976.

33. 5 Wigmore's Evidence, sec. 2286, 1923.

34. New Mexico Stat. Ann. sec. 20-1-12.1(c).

35. New York Civil Rights Law, sec. 79-h(b).

36. WBAI-FM v. Proskin, 344 N.Y.S.2d 393, 1973.

37. Farr v. Superior Court, 22 Cal.App.3d 60, 1971.

38. California Evidence Code, sec. 1070.

39. In re Farr, 36 Cal.App.3d 577, 1974.

40. In re Farr, 64 Cal.App.3d 605, 1976.

41. CBS v. Superior Court, 85 Cal.App.3d 241, 1978.

42. New Jersey Stat. Ann. 2A:84A-21 and 21a.

43. In re Farber, 394 A.2d 330, 1978.

44. In re Taylor, 193 A.2d 181, 1963.

45. 28 Penn. Stat. sec. 330.

46. Steaks Unlimited v. Deaner, 6 Med.L.Rptr. 1129, 3rd cir. 1980.